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IN THE

Supreme Court of the United States

October Term, 1965

No. 1017

LOUIS IRWIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, defendant-appellant below, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered December 10, 1965, affirming petitioner's conviction under Title 18, United States Code §201(f).

Opinions Below

The opinion of the United States Court of Appeals has not yet been reported. It is set forth in the Supplement hereto. A petition for rehearing was denied without opinion.

Jurisdictional Statement

The judgment of the Court of Appeals, dated December 10, 1965, was filed that day. The orders denying rehearing were dated and filed January 27, 1966.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Introduction

18 U. S. C. §201 (f), effective January 22, 1963, has not previously been construed in any reported opinion. We believe it is void for vagueness and uncertainty.

The court below has construed the section as outlawing gratuities given to federal employees. This is directly contrary to the understanding of the Congress that enacted it, and in effect creates a felony by judicial interpretation.

The trial court failed to instruct the jury that they would have to find criminal intent in order to convict. The Court of Appeals affirmed, although it had previously reversed the conviction of an internal revenue agent for accepting a gratuity (under a similar statute: 26 U. S. C. §7214 (a)(2)), on the ground that the trial court had failed to so charge.

Unless this court agrees to review, the effect of the decision below will make felons of all citizens who give Christmas gifts to their mailman. All taxpayers, all accountants, all who deal with federal employees are vitally concerned in the clarification of this controversial statute.

Questions Presented

1. Is 18 U. S. C. §201 (f) void for vagueness and uncertainty?
2. Is criminal intent an element of the felony defined in 18 U. S. C. §201 (f)?
3. If criminal intent is an element, did the trial judge err by failing so to charge?
4. If criminal intent is not an element, does this felony statute violate the Eighth Amendment?
5. Was petitioner denied a fair trial because the prosecution was allowed to introduce part of petitioner's testimony before the grand jury, even though (a) petitioner's attorney was not allowed to see the balance and (b) petitioner, the "target" of the grand jury inquiry, was effectually denied counsel before his grand jury appearance?

Applicable Constitutional and Statutory Provisions

1. 18 U. S. C. §201, entitled *Bribery of public officials and witnesses,* is set forth in full in the Supplement appended hereto. Section 201 (f) provides:

"Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or in-

directly gives, offers, or promises anything of value to any public official * * * for or because of any official act performed or to be performed by such public official * * *

"Shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

2. U. S. Constitution, Amendment V:

"No person shall * * * be deprived of life, liberty, or property, without due process of law * * *"

3. U. S. Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Statement of the Case

Petitioner was indicted for (1) conspiracy (18 U. S. C. §371); (2) bribery under 18 U. S. C. §201(b) (corrupt giving or offering of anything of value to a public official with intent to influence an official act); and (3) bribery under 18 U. S. C. §201(f) (giving or offering anything of value to a public official for or because of any official act).

The trial court dismissed the conspiracy count on the facts (280a).* The jury acquitted on the count specifically charging intent to influence, and convicted on the count under §201(f) [304a]. Judge Thomas F. Murphy imposed a sentence of one year (5a; 305a). The Court of Appeals affirmed.

* All references with the suffix "a" are to the printed appendix submitted by appellant to the Court of Appeals, copies of which are being filed herewith. All other references are to the certified record below.

Facts

Petitioner is a certified public accountant (14a; 279a) of outstanding reputation (265-7a; 183a; 192-4a; 228-231a) who has never been in trouble before (306a). In May 1963, on an "office audit" of four separate tax returns being conducted by co-defendant Jeanne Lupesco, he represented the taxpayers.

Lupesco, a tax technician at the Manhattan office of the Internal Revenue Service, pleaded guilty and testified that petitioner offered her $100 apiece if he could tell her "what the disallowances are" (22a). Lupesco prepared agreement forms and sent them to Irwin (23a). On June 17, 1963, Lupesco sent William Coady, a fellow tax technician, to Irwin's office (154-5a). Irwin gave Coady an envelope containing $400 (155-7a). Coady, an under-cover man working for the Inspection Service of the Treasury Department, delivered the envelope to Lupesco at the internal revenue office (156-7a).

Over defense objection, the court allowed DeSibio and McCallion, two ex-employees of the revenue service, self-confessed grafters, to testify that in 1961 and 1963 defendant Irwin had paid them $50 (114a), between $50 and $70 (83a) and $75 or $100 (116a) in connection with audits not part of the indictment.

The defense attempted to show that this internal revenue office was so corrupt that an accountant had no reasonable choice; when he faced a shake-down by an auditor there was literally no one to whom he could go for relief. He was at the mercy of an auditor who demanded a pay-off

by implication in a variety of ways: who would keep him waiting, keep him coming back repeatedly, keep making new demands for verification, unreasonable disallowances, etc., until it became crystal clear that he was being "shaken down". The normal, reputable, busy accountant cannot afford to put in days on end for a matter with the modest fee paid for tax return work.* The defense subpoenaed numerous witnesses to prove all this, which was relevant to the purpose of the alleged payment, but the trial judge refused to allow any such evidence (29a; 34-5a; 42a; 51a; 91a; 93-6a; 98a; 124a; 132a; 134-5a; 164a; 213a; 238-9a; 241a; 270a; 272a).

The taxpayers involved testified that their returns were accurate and supported by checks and receipts (185-8a; 200-201a; 206-9a; 214-6a). One return even had an error in the government's favor, the inadvertent omission of an exemption for a young dependent (214a; cf. 52-3a).

Six eminent character witnesses testified to defendant's excellent reputation for honesty, integrity and obedience to the law (183a; 192-4a; 224-5a; 227-8a; 228-231a; 265-7a).

Reasons for Granting the Writ

1. Section 201 (f) is void for vagueness and uncertainty.

18 U. S. C. §201 (f) violates the Fifth Amendment. It is too vague and uncertain to be the basis of a criminal conviction.

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* The fees for the four Lupesco-audited returns were: $200 (194a); $150 (210a); $100 (222a); and $150 (Ex. 4). Taxpayer Lamneck never paid the fee and owes Irwin $350 (222a). The Donelli return, audited by McCallion, was done without fee (177a).

Section 201(f) forbids gifts to a public official "for or because of any official act * * *" It carries a penalty of imprisonment up to two years, a fine of $10,000, or both.

Unlike Section 201(b), which forbids gifts made with intent to influence the public official, Section 201(f) does not use the word "intent".

At the trial, the prosecution asserted that intent was not an element of the offense—that it was *malum prohibitum* (8a; 640; 943). The defense contended that the defendant's purpose *was* still an element in the offense, and that his state of mind was one of the key issues to be decided (8a; 9a; 927 ff.; 966-7).

The trial court's charge (infra, p. 21) seemed to adopt the prosecution's position. The Court of Appeals concluded that Congress had adopted an anti-gratuity statute (Opinion, pp. 340-341), although the legislative history clearly shows that Congress itself did not so consider it.

The words "for or because of any official act" have no history in the law which would clarify their meaning. Reading the statute literally would turn totally innocent conduct into crimes.

The vagueness of the statute can be demonstrated by examples: Would an offense under Section 201(f) be committed (a) by the Pulitzer Prize committee in awarding the prize for literature to a judge who had written a brilliant opinion? (b) by a patient in a Veterans' Hospital who gives a Christmas present to a nurse or an orderly? (c) by a

householder who gives a Christmas gift to a postman? (d) by an accountant who takes a tax auditor to lunch?

Reading the statute literally, each is a gift to a public official, as broadly defined in Section 201(a), for or because of an official act. If they are crimes, the public has not received fair notice that a new statute (effective January 22, 1963) has made crimes out of conduct not hitherto considered such. *Wright* v. *Georgia,* 373 U. S. 284, 293 (1963); *Bouie* v. *City of Columbia,* 378 U. S. 347, 350 (1964); *Raley* v. *Ohio,* 360 U. S. 423, 438 (1959); *United States* v. *Cardiff,* 344 U. S. 174, 176 (1952). If they are not crimes, even though they meet the literal language of the statute, then the statute is void for uncertainty. The public and the courts are given no standard as to what conduct falls within the ban and what does not. *Winters* v. *New York,* 333 U. S. 507 (1948); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921); *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210 (1932).

In *Wright* v. *Georgia,* 373 U. S. 284, 293 (1963), the court said (per Warren, Ch. J.):

> "It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process. *Lanzetta* v. *New Jersey,* 306 U. S. 451; *Connally* v. *General Construction Co.,* 269 U. S. 385; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; see also *United States* v. *National Dairy Products Corp.,* 372 U. S. 29."

See also *Bouie* v. *City of Columbia,* 378 U. S. 347, 350 (1964).

In *Winters* v. *New York*, 333 U. S. 507, 515 (1948), the court said:

> "There must be ascertainable standards of guilt."

It quoted with approval the following statement of the law (p. 516):

> "Where the statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty." (State v. Diamond, 27 N. Mex. 477, 485, 202 Pac. 988.)

The court concluded (333 U. S. at p. 520):

> "Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Herndon* v. *Lowry*, 301 U. S. 242, 259."

Nor can it be left to individual courts or juries to make a distinction not made by the statute itself—that way lies chaos. If the statute fails to distinguish between innocent acts (like the Pulitzer Prize award or a Christmas gift to a letter-carrier) and truly reprehensible conduct, then it is void.

> "The objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact."

Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 541 (1951) quoted with approval in *Bouie* v. *City of Columbia*, 378 U. S. 347, 353 (1964).

This court concisely summarized the applicable rule in *Giaccio* v. *Pennsylvania*, 34 U. S. Law Week 4099, 4100 (January 19, 1966):

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. See, *e. g.*, *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Baggett* v. *Bullitt*, 377 U. S. 360."

It is no answer to say that the Pulitzer Prize committee and the postman's gift are in "peripheral areas" (Opinion, p. 341). In picking innocent possibilities, we have used the same reasoning as that of this court in *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964) and *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964). Speaking for the unanimous court in *Cramp*, Mr. Justice Stewart said (368 U. S. at 286):

> "The very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language. * * * While it is perhaps fanciful to suppose that a perjury prosecution would ever be instituted for past conduct of the kind suggested, it requires no strain of the imagination to envision the possibility of prosecution for other types of equally guiltless knowing behavior."

In *Baggett* v. *Bullitt*, the court (per White, J.) applied a questioned statute to several hypothetical situations (e.g., 377 U. S. at 368):

"Does the statute reach endorsement or support for Communist candidates for office? Does it reach a lawyer who represents the Communist party * * *?"

(p. 369):

"What about the editor of a scholarly journal who analyzes and criticizes the manuscripts of Communist scholars submitted for publication?"

The court's decision was (p. 368): "This statute * * * is unconstitutionally vague."

18 U. S. C. §201(f) is likewise fatally vague. The words "for or because", as used here, are of uncertain scope. The legislative history of the statute does not clear up the vagueness. If anything, it increases it. [Point 2, below.]

Conclusion

§201(f) is hopelessly confusing, and no jury can cope with it. Read literally, it would make a criminal of every householder in America who "remembers" his mailman. It would make it a felony to award a Nobel (or similar) Prize to a federal official for an official act. Such a statute cannot be the basis for a valid conviction, and the indictment must be dismissed.

The invalidity of this new federal bribery statute is, in the words of Rule 19, "an important question of federal law which has not been, but should be, settled by this court."

2. The construction of the Court of Appeals that the statute prohibits gratuities is completely contrary to the recorded understanding of Congress. No warning of the enactment of a new crime was given.

The Court of Appeals (Opinion, pp. 340-341) held that §201(f) is a new anti-gratuity statute. It held that "the awarding of gifts thus related to an employee's official acts" (p. 340) is now a felony, punishable by two years imprisonment and a $10,000 fine. This is so "even though the donor does not corruptly intend to influence the employee's official acts" (p. 340).

The uncontradicted understanding of the Congress that enacted §201(f) was that the bill did *not* cover gifts to government employees, and that it made "no significant changes of substance" (Senate Report No. 2213, 87th Congress, 2d Session, September 29, 1962, p. 4).

Senator Hruska of Nebraska said (108 Cong. Rec. 21991, October 3, 1962):

> "The provisions of H. R. 8140 dealing with bribery revise and consolidate into one section of the bill the several separate bribery sections *which are presently contained in the criminal code.* The consolidation of these sections helps to clarify this field and *renders uniform the definition of bribery.* The bill also provides for greater uniformity in penalties."
>
> * * *
>
> "I agree that there are further problem areas, such as the receipt of *gifts* by Government employees, which *are not covered by the bill.* These areas deserve our attention and should be studied further."*

* Throughout this petition all emphasis in quoted matter is ours.

The individual views of Senator Kenneth B. Keating (Senate Report No. 2213, supra, pp. 17-20) show that he also understood that the bill did not cover gifts to federal employees.

Roswell B. Perkins, Chairman of the Special Committee on the Federal Conflict of Interest Laws of the Association of the Bar of the City of New York, testified at the Hearing before the Senate Judiciary Committee on June 21, 1962 that his committee had concluded in 1960 that gifts to officials—even without intent to influence—should be "barred by an overall statute." (Hearing before the Committee on the Judiciary, United States Senate, 87th Congress, Second Session, on H. R. 8140, pp. 43 and 48). Mr. Perkins stated that H. R. 8140 (of which present §201(f) was a part) did not accomplish this, but that "The bill, if enacted, could easily be amended in a future year to add a gifts prohibition. [We] suggest not delaying enactment at this time to add a gifts provision." (id. p. 48; see also p. 43).

Senator Keating offered an amendment including an anti-gratuity provision as suggested by Mr. Perkins' committee, but it was defeated (id. p. 43). See Senate Report No. 2213, supra, pp. 17-20.

When the bill reached the floor of the Senate, its main sponsor was Senator Kefauver, who said (108 Congressional Record 21981, Oct. 3, 1962):

> "A secondary purpose of H. R. 8140 is to consolidate into a single section—section 201—of Government-wide application the gist of the various existing bribery statutes which apply separately to particular categories of Government officials and to jurors and witnesses

> (18 U. S. C. 201-213). This consolidation *makes no significant changes of substance* and would not narrow the broad sweep of the current bribery laws."

If, as the court below has held, the bill created a new crime of bribery without intent to influence, that would indeed be a "significant change of substance."

If such an "anti-gratuity" offense exists, it will be news to the executive branch of the United States government. On May 8, 1965, by Executive Order 11222 (33 U. S. Law Week 2599; May 18, 1965), it was provided:

> Except as authorized by an agency head, no employee may solicit or accept directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value from any person, corporation, or group that has or is seeking to obtain contractual or other business or financial relationships with his agency; conducts operations or activities that are regulated by his agency; or has interests that may be substantially affected by the performance or non-performance of his official duty.

If the court below was right, the order was unnecessary because such conduct is already forbidden by §§201(f) and 201(g). It was also illegal, because no agency head can authorize a violation of the criminal code.

The Congressional Record (107 Cong. Rec. 14774-14782 [House]; 108 Cong. Rec. 21975-21992 [Senate]; 108 Cong. Rec. 22311-22313 [House], the House Report (No. 748, 87th Congress, 1st Session, July 20, 1961), the Senate Report and the Hearing minutes all make it absolutely clear

that the lawmakers themselves, the Attorney General*, and the Bar Association Committee that worked for the statute, believed that it did *not* outlaw gratuities made without intent to influence. The decision below therefore in effect *creates* a new criminal statute with no warning whatsoever to the public whose conduct is being regulated.

> "Such warning is, of course, a requirement of the Fourteenth Amendment." Harlan, J. in *Garner* v. *Louisiana*, 368 U. S. 157, 206 (1961). See also *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939); *Raley* v. *Ohio*, 360 U. S. 423, 438 (1959).

In *Bouie* v. *City of Columbia*, 378 U. S. 347, 350 (1964) this court reversed a conviction because it "violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits."

Here, there has been no warning whatever. Surely if Congress had intended to remove the element of intent to influence, it would have done so in plain words which Senators Keating, Kefauver and Hruska, the Attorney General and Chairman Perkins could understand. Those men led in the drafting and enactment of the law. If they were mistaken, how can a member of the general public be held to act at his peril? "Men of common intelligence cannot be required to guess at the meaning of the enactment." *Winters* v. *New York*, 333 U. S. 507, 515 (1948); *Baggett* v. *Bullitt*, 377 U. S. 360, 367 (1964).

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* Nicholas de B. Katzenbach, then Deputy Attorney General, accompanied by two assistants who had participated in the drafting of the bill, testified at length before the Senate Judiciary Committee (Hearing, supra, pp. 16-35), but said nothing indicating that an offense without intent to influence was included in the bill. See esp. pp. 22-23.

Like the state legislatures, Congress has "an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required." *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 458 (1927).

The conclusion of the court below is in conflict with applicable decisions of this court to the effect that when Congress deals with a common law crime like bribery and fails to spell out the common law elements of *scienter*, intent to influence, etc., the statute will be deemed to include those elements by implication. *Burton* v. *United States*, 202 U. S. 344 (1906); *Morissette* v. *United States*, 342 U. S. 246 (1952). See *Levine* v. *United States*, 261 F. 2d 747, 751 (App. D. C. 1958).

Burton v. *United States*, 202 U. S. 344 (1906) involved §1782 of the Revised Statutes, which provided:

> "No Senator, Representative * * * head of a Department, or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any service rendered * * * in relation to any proceeding * * * or other matter * * * in which the United States is a party, or directly or indirectly interested * * *"

That statute, like 18 U. S. C. §201(f), carried a possible penalty of two years imprisonment and $10,000 fine. Like 18 U. S. C. §201(f), it was silent as to *scienter* and intent to influence.

Senator Burton of Kansas was accused of agreeing to accept $2,500 to help a corporation before the Post Office

Department (which had been marking its mail "Fraudulent"). The trial court (Judge, later Justice, Van Devanter) charged the jury that it could not convict unless it found that the defendant *intended to influence* or obtain favorable action from the Post Office Department. This court affirmed, quoting the charge with approval (202 U. S. 344, 375-6).

Morissette v. *United States,* 342 U. S. 246 (1952), involved 18 U. S. C. §641. In enacting that section in 1948, Congress did with the various forms of larceny of government property what it did in 1962 with the various forms of bribery: it collected them into one section, and, in dealing with conversion of government property it did not specifically make criminal intent an element of the offense. Morissette admittedly had taken used shell casings from a government bombing range and had sold them as scrap. The trial court refused to allow the defense to argue that defendant had no criminal intent (i.e. that he thought the casings had been abandoned). It said the statute forbade the act of conversion without specifying an intent, and that the act alone warranted conviction. This court unanimously reversed, holding that when a statute deals with a common law crime, but does not specifically require intent as an element, the court will imply it.

The court (per Jackson, J.) said that the view that intent is an essential element of a crime "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil" (342 U. S. at 250). Only in exceptional cases—the "public

welfare offenses'' (e.g. sale of adulterated food, drugs, etc.) —is the requirement of intent omitted. And there ''penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.'' (342 U. S. at 256, quoting at p. 258 Judge Cardozo's statement in *People ex rel. Price* v. *Sheffield Farms Co.*, 225 N. Y. 25, 32-33, expressly declining to rule as to whether such a statute could include the power to imprison).

In a footnote (342 U. S. at 264), the court pointed out that ''intent to influence'' was an element of the crime of bribery under 18 U. S. C. §201. The courts should not lightly impute to Congress an intent to do away with this essential element.* That is especially so where, as here, the House Report said that ''the bill [enacting §201(f)] * * * adopts the policy of * * * the present general bribery provisions * * *'' (House Report No. 748, 87th Congress, 1st Session, July 20, 1961, p. 16) and the Senate Report called the bill a ''substitution of a single comprehensive section of the Criminal Code for a number of existing statutes concerned with bribery. This consolidation would make no significant changes of substance * * *'' (Senate Report No. 2213, 87th Congress, 2d Session, September 29, 1962, p. 4).

The court below attempted to distinguish the *Morissette* case by finding that Congress ''made what appears to us to have been a deliberate choice to omit any specific intent as an element of the offense under §201(f) * * *'' (Opinion p. 343).

* Indeed, the requirement of intent should not be deemed removed unless the Congressional purpose to do so is clearly shown. *Honea* v. *United States*, 344 F. 2d 798 (5th Cir. 1965).

On the direct contrary, the Senate was advised: "Section 201 would * * * make *uniform* the proscribed acts of bribery, as well as the *intent* or purpose making them unlawful." (Senate Report No. 2213, supra, p. 7).

In the *Morissette* case, this court said (pp. 266-267):

> "We find no other purpose in the 1948 reenactment than to collect from scattered sources crimes so kindred as to belong in one category. Not one of these had been interpreted to be a crime without intention and no purpose to differentiate between them in the matter of intent is disclosed."

The same conclusion should be reached here.

Honea v. *United States,* 344 F. 2d 798 (5th Cir. 1965) presented the same problem of construction that is involved here. That case involved false personation under 18 U. S. C. §912, which contains two separate offenses [1] false personation and acting as such, and [2] false personation and demanding or obtaining property. Intent to defraud was an express element of the crime under old §76 of Title 18, U. S. C. 1940 ed. In 1948, §912, replacing §76, deleted the words "intent to defraud". The court held that, despite the deletion, intent to defraud was an essential element of the crime, saying (p. 803):

> "To hold otherwise would be to attribute to Congress an intent to greatly expand the scope of the statute so as to include and subject to serious penalty (3 years and/or $1,000) a broad range of possible conduct which, while blameworthy, would not ordinarily be regarded as having the major government significance of actions violating part [1].
>
> * * *

> Certainly Congress could conclude that this should be a federal crime. But we do not believe that Congress in its preoccupation with offense [1] intended purposefully to eliminate the fraudulent intent element as to offense [2] and thereby wreak a change of major significance, both in the moral qualities of the substantive offense and in the punishment."

The fact that specific intent to influence is spelled out in 18 U. S. C. §201(b) and not in §201(f) does not mean it was deliberately omitted. A similar situation existed in *Dennis* v. *United States,* 341 U. S. 494 (1951). The court said (per Vinson, Ch. J.) at p. 499:

> "Because of the fact that §2(a)(2) expressly requires a specific intent to overthrow the Government, and because of the absence of precise language in the foregoing subsections, it is claimed that Congress deliberately omitted any such requirement. We do not agree. It would require a far greater indication of congressional desire that intent not be made an element of the crime than the use of the disjunctive 'knowingly *or* wilfully' in §2(a)(1), or the omission of exact language in §2(a)(3). The structure and purpose of the statute demand the inclusion of intent as an element of the crime. * * * We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." (citing cases)

The court continued (p. 500):

> "A survey of Title 18 of the U. S. Code indicates that the vast majority of the crimes designated by that Title require, by express language, proof of the existence of a certain mental state, in words such as 'knowingly', 'maliciously', 'wilfully', 'with the purpose

of', 'with intent to', or combinations or permutations of these and synonymous terms. The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. See *American Communications Assn.* v. *Douds*, 339 U. S. 382, 411 (1950)."

The instruction given by the trial court gave the jury no guidance at all on the intent necessary for §201(f). It gave the distinct impression that a finding of criminal intent was not necessary for a conviction under §201(f). The court charged:

"In other words, under the first crime that is charged the defendant must have had, and the government must prove beyond a reasonable doubt that he had, a corrupt and evil intent to influence her in an official act, namely, the office audit examinations of those returns.

In the second crime that is charged the elements that the government must prove are substantially different. Under this second charge the government must prove beyond a reasonable doubt that on the 17th of June the defendant wilfully and knowingly, that is, intentionally as distinguished from inadvertently or negligently, gave $400 which he was not required by law to give to Jeanne Lupesco for and because of official acts performed or to be performed by her, namely, the office audit examinations of the returns in question. In short, *this crime does not require the evil intent or the corrupt intent that the first crime requires, nor does it have to have as a purpose the intent to influence* the public official but rather to have as a reason for the giving of the money the performance by the recipient

of some official act, namely, the audit examination of the returns in question." (292-3a)*

Defendant specifically took exception to this portion of the charge (301-2a).

If §201(f) requires some degree of criminal intent, even if less than the intent to influence necessary for §201(b), the jury should have been instructed about it.

26 U. S. C. §7214(a)(2), prohibiting receipt of any "compensation or reward" by a revenue employee "for the performance of any duty" is, like §201(f), silent as to intent, yet the Court of Appeals recently reversed a conviction because the trial court failed to charge that a finding of criminal intent was prerequisite to a verdict of guilty. *United States* v. *Franz Byrd*, 352 F. 2d 570 (2d Cir. November 16, 1965). In this situation, there is no reason for inconsistency in treatment of the accused giver and the accused receiver. This apparent conflict merits review by this court.

The court below held that the only "criminal intent" necessary here was a showing that the act was done "knowingly and purposefully" and not through accident or inadvertence (Opinion, p. 343). Under this ruling, the President of the United States would commit a felony if, like Theodore Roosevelt, he accepted the Nobel Peace Prize.

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* Presumably referring to the "first crime" [§201 (b)], which required intent, the charge continued:

> "Thus, you are called upon to determine what was in the defendant's mind and the purpose which motivated him in his course of conduct. Direct proof is rarely available to establish intent. Like any other fact, it may be proved by circumstantial evidence." (293-a)

The jury's lack of understanding about intent is shown by the question sent from the juryroom:

> "If it were decided that this was a 'shakedown', or if coercion were used on the defendant, does this affect Count 3?" (304a)

The jury acquitted defendant of the count charging payment with intent to influence. It convicted only on the count omitting such intent. If the jury had been properly instructed that intent is also an essential element of the latter, it undoubtedly would have acquitted on both counts.

It is likely that cases involving §201(f) will be numerous. Both the prosecution and the defense in such cases would benefit from a ruling by this court as to the nature of the intent, if any, that is an element of the offense. A ruling now will render unnecessary a multitude of future appeals and petitions for certiorari.

3. As construed below, §201 (f) violates the Eighth Amendment.

At the trial, the prosecution's contention that §201(f) created a *malum prohibitum* was apparently adopted by the trial judge. He did not charge that a finding of criminal intent was a prerequisite to conviction.

If, despite all the legislative history to the contrary, §201(f) be deemed to enact a *malum prohibitum*, it violates the Eighth Amendment. It is a felony and its prescribed penalty is so severe (for an offense without criminal intent) as to constitute cruel and unusual punishment. *Robinson* v. *California*, 370 U. S. 660 (1962); *Trop* v. *Dulles*, 356 U. S.

86 (1958); *Weems* v. *United States*, 217 U. S. 349, 371, 381 (1910); see *Smith* v. *California*, 361 U. S. 147, 162 (1959) and *Morissette* v. *United States*, 342 U. S. 246, 256, 258 (1952).

4. The prosecution should not have been allowed to introduce part of defendant's grand jury testimony.

(A) Over defendant's objection, the court allowed the prosecution to introduce testimony given by defendant before the grand jury, in which he denied having made payments to internal revenue agents (174-5a).

The next day, after having consulted counsel, defendant again appeared before the grand jury (310a). Despite demand made at the trial, defendant's counsel was not allowed to see his testimony given the second day (173a).

There is good reason to believe that defendant took a different position the second day (310a). His counsel should have been allowed to look at his full testimony.

Refusal to allow defendant's counsel to see the balance of defendant's grand jury testimony was manifestly unfair, and violated elementary requirements of completeness. *United States* v. *Cotter*, 60 F. 2d 689, 692 (2d Cir. 1932) cert. den. 287 U. S. 666 (1932); *United States* v. *Stone*, 282 F. 2d 547, 551-2 (2d Cir. 1960) cert. den. 364 U. S. 928 (1960); cf. *United States* v. *Grunewald*, 164 F. Supp. 644, 648 (S. D. N. Y. 1958); 7 Wigmore, *Evidence* (3d ed. 1940) §§2103, 2108 *et seq.*, §2113.

In *United States* v. *Cotter, supra,* the prosecution introduced part of defendants' testimony before the grand jury. When defendants' counsel asked for a general inspection of the minutes, the trial judge went over the minutes himself, "decided what parts were relevant, and laid so much open". The Circuit Court of Appeals held that defendants' counsel was entitled to see all of defendants' grand jury testimony, saying (per L. Hand, C. J.):

> "It is indeed true that the prosecution having used the former testimony, the defendants were entitled to put in such other parts as threw light on it. Wigmore, §2113. Nor is this right secured by the judge's going over the record for himself and selecting so much as he thinks relevant. The party must be allowed an inspection for himself; not of the whole minutes of course, but of the whole evidence of the witness."

In *Pittsburgh Plate Glass Co.* v. *United States,* 360 U. S. 395, 404 (1959) Mr. Justice Brennan, dissenting, pointed out:

> "Of course, when the Government uses grand jury minutes at trial the defense is ordinarily entitled to inspect the relevant testimony in those minutes. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 233; *United States* v. *Cotter,* 60 F. 2d 689."

Failure to grant a proper request to see grand jury testimony is reversible error. *United States* v. *Rosenberg,* 245 F. 2d 870 (3d Cir. 1957).

The court below admitted that " 'fair dealing' requires that the defense have some access to grand jury minutes after the prosecution puts them into evidence" (Opinion, p. 345). It affirmed nevertheless, stating (p. 346):

"However, no objection was made to the introduction of the grand jury minutes put in by the Government, and the appellant never moved to have the remaining minutes produced. Under these circumstances there was no affirmative duty on the part of the Government to produce them."

The court was clearly mistaken on this pont. The record shows that when the prosecution offered the incomplete record of defendant's grand jury appearances, defendant's counsel (Mr. Wessel) said (173a):

"I object, without stating the reasons, your Honor. I also object on the grounds of completeness.

Mr. Maloney: Does counsel wish me to offer in evidence the minutes of the next day?

Mr. Wessel: I would like to see them.

The Court: I will receive 21B" [Transcript of stenographer's notes].

The objection was made and the request to see the ballance of the testimony was made. Never having been allowed to see the testimony, petitioner is in no position to make a "showing of damage or prejudice." He had an unquestioned right to have his counsel see the balance of the minutes and to offer such part as he deemed appropriate. It is the accused's right that this decision be made by his counsel, not by the prosecutor, the trial court or the appellate court.

(B) Defendant's grand jury testimony should have been suppressed because he was admittedly the "target", and his testimony was not "freely given, all things considered" (306-310a). See *United States* v. *Cleary,* 265 F. 2d 459, 462 (2d Cir. 1959) cert. den. 360 U. S. 936 (1959); *United*

States v. *Klein*, 247 F. 2d 908, 921 (2d Cir. 1957) cert. den. 355 U. S. 924 (1958). In *United States* v. *Scully*, 225 F. 2d 113, 116 (2d Cir. 1955) cert. den. 350 U. S. 897 (1955), Judge Medina said:

> "Indeed, one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a Grand Jury any person who is *de jure* or *de facto* an accused."

Although the government had known of its case against Irwin since June 1963 (154-6a), and although Irwin had been available during business hours at his office at 551 Fifth Avenue, New York City, the prosecution waited until late at night on January 30, 1964, then woke defendant up at his home to serve a subpoena returnable early the next morning (306-7a). This kind of gestapo pressure is calculated to put a man in such a state that the "pro forma" warning does not get through to him; it does not really inform him of his rights.

The subpoena served on Mr. Irwin contained the word "witness" in two places, and specifically refers to testimony on the days "on which you attend Court as a witness" (829). In Irwin's mind, he was a witness, not a subject (307a). He did not hear, understand or appreciate the prosecution's warning that appears in the transcript (174a; 307-8a). The words were undoubtedly read in the rapid, perfunctory manner characteristic of such formal warnings, and did not convey the necessary information to the witness. In *People* v. *Witenski*, 15 N. Y. 2d 392 (1965), the court reversed a conviction based on a guilty plea although

the record contained the statutory warning, and said (per Desmond, Ch. J. at p. 395):

> "* * * in every criminal case, large or small, the court must 'make it clear' to defendant that these rights exist and that the opportunity to have the services of counsel must be real and reasonable, not a mere formulistic recital of 'law language'. The law as to the right to counsel must be made 'meaningful and effective' in criminal courts on every level * * *"

(C) The subpoena to appear before the grand jury was served on defendant late the night before the morning of his required appearance, giving him no opportunity to consult counsel (306-7a). As a practical matter, this amounted to denial of counsel, contrary to the 6th Amendment. Cf. *Johnson* v. *Zerbst,* 304 U. S. 458 (1938); *Gideon* v. *Wainwright,* 372 U. S. 335, 339-340 (1963). Under such circumstances, statements by the defendant are inadmissible. *Escobedo* v. *Illinois,* 378 U. S. 478 (1964); *Johnson* v. *United States,* 344 F. 2d 163 (App. D. C. 1964).

Conclusion

Petitioner has been convicted under a new statute that has not been clarified by reported opinions, and which is void for vagueness and uncertainty.

The court below held that this statute prohibited gratuities to federal officials, a conclusion completely contrary to the recorded understanding of the enacting Congress. No warning of the enactment of such a crime was given in any way.

The relationship between public officials and those who deal with them is one of nation-wide significance. This important federal question should be settled by this court.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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A

Supplement

18 U. S. Code §201. Bribery of public officials and witnesses

(a) For the purpose of this section:

"*public official*" means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(d) Whoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear

evidence or take testimony, or with intent to influence such person to absent himself therefrom; or

(e) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom—

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of

the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom; or

(i) Whoever, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given or to be given by him as a witness upon any such trial, hearing or other proceeding, or for or because of his absence therefrom—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(j) Subsections (d), (e), (h), and (i) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(k) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title. Added Pub. L. 87-849, §1(a), Oct. 23, 1962, 76 Stat. 1119.

E

(337)

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 33—September Term, 1965.

(Argued September 21, 1965 Decided December 10, 1965.)

Docket No. 29703

UNITED STATES OF AMERICA,

Appellee,

v.

LOUIS IRWIN,

Defendant-Appellant.

Before:

MOORE, SMITH and ANDERSON,

Circuit Judges.

Appeal from a judgment of conviction by the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge,* sitting with a jury, on a charge of violating Title 18 U. S. C. §201(f) by giving an employee of the Internal Revenue Service $400 for and because of the employee's audit of an income tax return. Affirmed.

MILTON R. WESSEL, Esq., New York, N. Y. (Louis W. Bookheim, Jr., Esq. and Kaye, Scholer, Fierman, Hays & Handler of New York, N. Y., on the brief), *for Defendant-Appellant.*

Opinion of the United States Court of Appeals

(338)

ANDREW J. MALONEY, Ass't U. S. Atty., Southern District of New York (Robert M. Morgenthau, U. S. Atty., David M. Dorsen and John E. Sprizzo, Ass't U. S. Attys., Southern District of New York, on the brief), *for Appellee.*

ANDERSON, *Circuit Judge*:

The appellant, Irwin, a certified public accountant since 1943, was indicted on December 1, 1964 on three counts: the first charged conspiracy with one Jeanne Lupesco, an employee of the Internal Revenue Service, to violate Title 18 U. S. C. §§201(b) and (f);[1] the second charged a viola-

1. §201(b) and (f) read as follows:

(b) "Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or"

(f) "Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or"

tion of Title 18 U. S. C. §201(b), alleging that Irwin had given his co-defendant Lupesco a sum of money with intent to influence her official actions relating to audits of the (339) income tax returns of several of Irwin's clients; and the third charged him with a violation of Title 18 U. S. C. §201(f), alleging that he had given Lupesco, as a public official, $400 for or because of her auditing the income tax returns of several of Irwin's clients. The court dismissed the first, or conspiracy count, at the close of the Government's case. The jury acquitted Irwin on the second count and convicted him on the third. The court entered judgment of conviction on the third count and sentenced Irwin to one year in prison; from this judgment Irwin appeals. We affirm the judgment below.

His principal ground of appeal is that the statute, §201 (f), under which he was convicted, is unconstitutionally vague on its face. He also raises questions concerning the admissibility of certain evidence, disclosure of grand jury minutes and entrapment.

The portions of Title 18 U. S. C. §201(f), pertinent to this case, read as follows:

> "Whoever . . . directly or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . ."

§201(a), in relevant part, defines a public official as ". . . [an] employee . . . acting for or on behalf of the United States or any department, agency or branch of Government thereof . . . in any official function, under or by authority of any such department, agency or branch of Gov-

ernment . . ." and defines an official act as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit."

(340) While the legislative history of this section is not illuminating, it is clear that in passing it in 1962, Congress consolidated and to some extent re-wrote several sections of Title 18, dealing with bribery and corruption, and also added some new provisions to buttress and make more effective the prevention of this kind of public wrong. Many of the provisions were placed in §201. Of these subsections (b) through (e) define offenses which include the specific intent to influence or induce an official or witness, or, in the case of the official or witness permitting himself to be influenced or induced, as an essential element. Subsections (f) through (i), however, define offenses concerning which there is no mention of intent to influence or induce. The penalties for the first group are a maximum fine of $20,000 or three times the money equivalent of the thing of value, whichever is greater, and a maximum imprisonment for fifteen years, or both; while the penalties for the second group are a maximum of $10,000 fine or two years imprisonment or both.

The appellant's assertion that the provisions of §201(f) are vague and uncertain are without merit. It is apparent from the language of the subsection that what Congress had in mind was to prohibit an individual, dealing with a Government employee in the course of his official duties,

from giving the employee additional compensation or a tip or gratuity for or because of an official act already done or about to be done.

The awarding of gifts thus related to an employee's official acts is an evil in itself, even though the donor does not corruptly intend to influence the employee's official acts, because it tends, subtly or otherwise, to bring about preferential treatment by Government officials or employees, consciously or unconsciously, for those who give gifts as (341) distinguished from those who do not. The preference may concern nothing more than fixing the time for a hearing or giving unusually prompt consideration to the application of a donor while earlier applications of non-donors are made to wait, even though there is no evidence that the donor sought the particular preference. Moreover, the behavior prohibited by §201(f) embraces those cases in which all of the essential elements of the bribery offense (corrupt giving) stated in §201(b) are present except for the element of specific intent to influence an official act or induce a public official to do or omit to do an act in violation of his lawful duty. The iniquity of the procuring of public officials, be it intentional or unintentional, is so fatally destructive to good government that a statute designed to remove the temptation for a public official to give preferment to one member of the public over another, by prohibiting all gifts "for or because of any official act," is a reasonable and proper means of insuring the integrity, fairness and impartiality of the administration of the law. It is clearly within the power of Congress to enact such a statute.

The appellant seeks to prove his point by suggesting hypothetical cases taken from the peripheral areas of the statute's scope; but he can derive no assistance from that source. He must show that, as applied to his own case, the statute was so vague and uncertain that he was not presented with an "ascertainable standard of guilt." *Winters* v. *New York,* 333 U. S. 507, 515 (1948). The facts of the present case bring it squarely within the provisions of §201(f), construed in the light of the definitions in §201(a). The statute furnished adequate warning to anyone of ordinary intelligence that the kind of conduct embarked upon by the appellant would constitute an offense. §201(f) is not

> (342) ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . ."

Connally v. *General Construction Co.,* 269 U. S. 385 at 391 (1926). The appellant was not "required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453 (1939). As long as the statute is clear as to the appellant's behavior, we need not be concerned that at the outer fringes of the statute's bounds there may be close or difficult cases.

> ". . . [O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

United States v. *Raines,* 362 U. S. 17 at 21 (1960). The appellant argues that the words in the statute "for or because

of" are obscure and confusing in relation to the element of intent. He asserts that they may mean either that the Government must prove a specific intent to influence as in §201(b), or that they refer to an intent "less than" the intent stated in §201(b) or that they mean no element of intent is required at all.

The intent to influence, accompanying the corrupt giving or accepting of something of value, is an essential element of §201 (b, c, d, e) which Congress dealt with in separate subsections, and for the violation of each of which it attached severe penalties. No similar provisions concerning corrupt giving and specific intent to influence or induce were included in §201 (f, g, h, i), and the penalty provided for a (343) violation of any of those subsections was much less severe. Obviously Congress made a distinction between the two groups of subsections and purposely omitted from the latter group the description of the specific intent which was an essential element of the former.[2]

This does not mean, however, that intent is not an essential element of the offense set forth in §201(f). Although the specific intent of subsections (b) through (e) are not required, nevertheless, to convict an accused under subsections (f) through (i), it is necessary that the Government prove that he committed the act prohibited knowingly

2. Because Congress did manifest an awareness of the element of intent, and because it made what appears to us to have been a deliberate choice to omit any specific intent as an element of the offense under §201(f), we think that *Morissette* v. *United States*, 342 U. S. 246 (1952) is distinguishable.

and purposefully and not through accident, misunderstanding, inadvertence or other innocent reasons.

> "Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. That awareness is all that is meant by the mens rea, the 'criminal intent,' necessary to guilt, as distinct from the additional specific intent required in certain instances . . ."

United States v. *Crimmins,* 123 F. 2d 271 at 272 (2d Cir. 1941). See also *United States* v. *Rappaport,* 292 F. 2d 261 (3d Cir. 1961), cert. denied 368 U. S. 827 (1961).

In addition, subsection (f) requires that the Government, to convict an accused, must prove that the purpose which he had in mind in making or promising to make a gift to a public official was to give additional compensation or a reward, gratuity or similar favor, by reason of some "official act, performed or to be performed by such public (344) official." It is not necessary for the Government to show that the gift caused or prompted or in any way affected the happening of the official act or had anything to do with its nature or extent or the manner or means by which it was performed. The making of the gift "for or because of any official act" limits the prohibition against the act of making a gift to a public official to those which are accompanied by and are made with this particular state of mind, design or purpose, which is the essence of intent. Whether this is regarded as a specific intent or as a limitation on the acts that are within the purview of the subsection is of no consequence. The state of mind with which the act is done is an essential element of the offense which the Government must prove.

Opinion of the United States Court of Appeals

The appellant complains that the trial judge did not properly or adequately instruct the jury[3] on the definition of criminal intent and its presence or absence as an element of the offense charged under §201(f). We are of the opinion, however, that the jury was fully and correctly charged on (345) the issue of intent including the meaning and application of the phrase, "for or because of any official act."

The appellant claims reversible error in certain rulings by the trial court on the admissibility of evidence. His counsel sought to cross-examine Lupesco and other Government witnesses on the subject of other instances of bribery, for which they had been indicted, for the purpose of impeaching their credibility. The trial judge allowed all of

3. Judge Murphy instructed the jury on intent and state of mind as follows:

> "In the second crime that is charged [the third count] the elements that the government must prove are substantially different. Under this second charge [the third count] the government must prove beyond a reasonable doubt that on the 17th of June the defendant wilfully and knowingly, that is, intentionally as distinguished from inadvertently or negligently, gave $400 which he was not required by law to give to Jeanne Lupesco for and because of official acts performed or to be performed by her, namely, the office audit examinations of the returns in question. In short, this crime does not require the evil intent or the corrupt intent that the first crime requires, nor does it have to have as a purpose the intent to influence the public official but rather to have as a reason for the giving of the money the performance by the recipient of some official act, namely, the audit examination of the returns in question.
>
> Thus, you are called upon to determine what was in the defendant's mind and the purpose which motivated him in his course of conduct. Direct proof is rarely available to establish intent. Like any other fact, it may be proved by circumstantial evidence."

the witnesses to testify as to other bribes which they had accepted, but sustained objections to questions concerning the details of criminal acts committed by them which were then the subject of pending indictments. These rulings were within the court's discretion, which was not erroneously exercised. *United States* v. *Owens*, 263 F. 2d 720 (2d Cir. 1959). In the course of the trial the appellant sought to introduce evidence showing that the returns of the taxpayers he represented, in the instances involved in this prosecution, were proper, as filed. The purpose of the offer was to show that he had no motive to make the payments other than to meet the demands of the agents at the Internal Revenue Service. This evidence was entirely irrelevant to the offense charged under §201(f) and was properly excluded.

The appellant also complains that the Government introduced only a part of his grand jury testimony, and that the denial of access to the remainder constituted reversible error. It is generally true that "fair dealing" requires that the defense have some access to grand jury minutes after the prosecution puts them into evidence. "[T]he prosecution having used the former testimony, the defendants were entitled to put in such other parts as threw light upon it." *United States* v. *Cotter*, 60 F. 2d 689 at 692 (2d Cir. 1932), cert. denied 287 U. S. 666; see also, *United States* v. *Dardi*, (346) 330 F. 2d 316, 334-35 (2d Cir. 1964). However, no objection was made to the introduction of the grand jury minutes put in by the Government, and the appellant never moved to have the remaining minutes produced. Under

these circumstances there was no affirmative duty on the part of the Government to produce them. *United States* v. *Cotter, supra,* at 692, particularly in view of the absence of any showing of damage or prejudice to the accused. Essentially all of the testimony which the appellant gave to the grand jury consisted of his claims of privilege against self-incrimination. There was virtually no substantive testimony given. We are satisfied that there was no error in this regard.

We do not think that there was any impropriety in the fact that the United States Attorney called Irwin to appear before the grand jury. The appellant urges that his grand jury testimony should have been suppressed because he was a "target" of the investigation and "his testimony was not freely given, all things considered." It is clear from the minutes of the testimony given by Irwin on January 31, 1964 that he was made fully aware of his constitutional rights to remain silent and to consult with counsel. Furthermore, he was clearly told that he was a subject of the investigation and "that it is highly probable that this Grand Jury . . . may vote an indictment charging you with . . . violations" of 18 U. S. C. §201. In this circumstance we must, as we did in *United States* v. *Winter,* 348 F. 2d 204 (2d Cir. 1965) reject the contention that appellant's rights were violated when he was called to testify. To find otherwise in a case like this, where appellant was fully apprised of his rights, we would "denude that ancient body of a substantial right of inquiry." *United States* v. *Winter, supra,* at 207.

Opinion of the United States Court of Appeals

(347) The appellant also claims that he was entrapped because, even after the Government learned that its Internal Revenue Service employee, Jeanne Lupesco, was illicitly engaged in taking bribes to influence her official acts, it did nothing to stop her so that she, unaware that she had been detected, was still in a position to accept unlawful payments from the appellant. This theory of entrapment cannot be supported in reason or authority. The policy underlying the defense of entrapment is to prevent the Government from enticing an otherwise innocent party into the commission of a crime which, absent the inducement by the Government agent, would never have been committed. It is not affirmatively to remove temptation and opportunity from persons already predisposed to commit an offense. See, *Sorrells* v. *United States,* 287 U. S. 435 (1932).

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. . . .
>
> However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials."

Sherman v. *United States,* 356 U. S. 369 at 372 (1958). See also, *Lopez* v. *United States,* 373 U. S. 427, 434-35 (1963). This case is very similar to the situation which was present in *United States* v. *Gosser,* 339 F. 2d 102 (6th Cir. 1964), cert. denied 34 U. S. Law Week 3118, Oct. 12, 1965. There

too an Internal Revenue Service employee, who had been detected by the Service, was permitted to remain at work (348) and continue her illegal activities contrary to the provision of 26 U. S. C. §7214. The conviction of Gosser was nevertheless affirmed. There was in that case, as there is in the present case, some evidence that the defendant had committed violations of the law even prior to the discovery by the Government of its dishonest employee. In both of these cases the Government did not even take affirmative action to "afford opportunities or facilities" but simply refrained from foreclosing an already existing opportunity.

Judge Murphy was entirely justified in concluding that there was no evidence of entrapment and he committed no error in refusing to submit that issue to the jury. *United States* v. *Kabot,* 295 F. 2d 848 at 854-55 (2d Cir. 1961), cert. denied 369 U. S. 803 (1962); see *United States* v. *Winfield,* 341 F. 2d 70 (2d Cir. 1965) (appeal pending); *United States* v. *Romano,* 278 F. 2d 202 (2d Cir. 1960); *United States* v. *Gosser, supra*; cf., *Sears* v. *United States,* 343 F. 2d 141 (5th Cir. 1965).

The remaining points raised by the appellant on his appeal have no merit and call for no discussion. The judgment of conviction is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1017

LOUIS IRWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. E–Q) is reported at 354 F. 2d 192.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1965. A petition for rehearing was denied on January 27, 1966. The petition for a writ of certiorari was filed on February 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a specific intent to influence an official act is an essential element of the statute (18 U.S.C. 201(f)) punishing payments to public officials "for or because of any official act."

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2. Whether 18 U.S.C. 201(f) is unconstitutionally vague.

3. Whether petitioner's grand jury testimony was properly admitted in evidence.

STATUTE INVOLVED

18 U.S.C. 201 (76 Stat. 1119) provides in pertinent part:

> (a) For the purpose of this section:
>
> * * * * *
>
> "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.
>
> * * * * *
>
> (f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or;
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT

Petitioner was convicted in the District Court for the Southern District of New York of paying $400 to Jeanne Lupesco, an employee of the Internal Revenue Service for or because of her official act in

auditing income-tax returns. He was sentenced to imprisonment for one year.

The evidence showed that on May 27, 1963, petitioner, a certified public accountant, came to the Internal Revenue Service office to discuss the audit of the income-tax returns of four taxpayers with Jeanne Lupesco, an office auditor. Miss Lupesco prepared a work sheet on the first return and informed petitioner what amounts would be disallowed. Petitioner replied, "Can you do a little better? * * * Look Jeanne, I have four cases. I will give you $100 apiece provided I can tell you what the disallowances are." Miss Lupesco agreed and prepared four work sheets which corresponded with the disallowances suggested by petitioner (R. 21–23). On previous occasions, petitioner had given Miss Lupesco theatre tickets, perfume, costume jewelry and magazine subscriptions (R. 71–75). He had also given money to two other agents for favorable audits (R. 82–83, 115).

On June 17, 1963, a fellow employee picked up an envelope for Miss Lupesco at petitioner's office. After petitioner gave the employee the envelope he introduced the employee to his partner and said, "If you ever need a favor in group 82, he is the man we can contact." The employee, who was acting as an undercover agent, gave the envelope which contained $400 to Miss Lupesco (R. 154–157).

ARGUMENT

1. The applicable statute, 18 U.S.C. 201(f), makes it a crime for anyone to make any payment to a public official "for or because of any official act per-

formed or to be performed by such public official". Section 201(b) defines official act to include "any decision or action" on any matter pending before a public official in his official capacity (*supra*, p. 2). An examination of the entire statutory scheme demonstrates that Congress intentionally chose not to make intent to influence official action an essential element of the offense.

The statute was enacted by Congress in 1962 as part of a bill "to strengthen the criminal laws relating to bribery, graft, and conflicts of interest * * *. Senate Report No. 2213, 87th Cong., 2nd Sess., p. 1. The bill contained a variety of sanctions appropriate for different degrees of delinquency. Section 201(b)(1) proscribes payments with the intent "to influence any official act," and fixes a maximum penalty of fifteen years' imprisonment. Section 201(f) relates to payments "for or because of any official act" and provides a maximum penalty of only two years. The more serious offense in section 201(b) is different, therefore, from the lesser offense in section 201(f), and it would eradicate this distinction to construe section 201(f), as petitioner contends, to require an intent to influence official action. Moreover, the House Committee report expressly states that a distinction was intended between bribes exchanged corruptly, with intent that action shall be influenced (sec. 201 (b), (c), (d), and (e)), which merit severe penalty, and payments "for or because of" action (sec. 201 (f), (g), (h), and (i)), which merit a lesser penalty. H. Rep. No. 748, 87th Cong., 1st Sess. p. 17.

Nor do the statements in the legislative history of

the bill regarding the receipt of gifts by government employees (Pet. 12–14) support petitioner's contention. A payment because of any "action on a matter pending" before a public official is not a "gift" in the sense discussed by Senators Hruska and Keating; it is a payment for services rendered, even if it does not bear all the corrupt earmarks of bribery. The rejected amendment offered by Senator Keating went beyond the enacted bill in proposing restrictions against the receipt of gifts of any sort, even if they were not tied to official acts. Since such gifts are not illegal under section 201(f), the statements cited by petitioner are not inconsistent with the plain meaning of the statute or the construction given it in this case. See S. Rep. No. 2213, 87th Cong., 2d Sess. p. 19.

It follows that the court properly instructed the jury on intent when it said: "In short, this crime does not require the evil intent or the corrupt intent that the first crime requires, nor does it have to have as a purpose the intent to influence the public official but rather to have as a reason for the giving of the money the performance by the recipient of some official act, namely the audit examination of the returns in question" (R. 292–293).

2. Section 201(f) in proscribing payment "for or because of any official act" gives fair warning of the acts which it proscribes. The statute itself defines "official act" to include "any decision or action" on any matter pending before a public official in his official capacity (*supra*, p. 2). It is a matter of common knowledge that a payment, however motivat-

ed, to a public official for or because of any action on a matter pending before him may be detrimental to the government. Petitioner paid money to a government employee for auditing income-tax returns and he has no basis for complaining that he could not reasonably understand that such conduct was proscribed by the statute. See *United States* v. *National Dairy Corp.*, 372 U.S. 29, 31–33. There is surely no similarity between such a payment and the hypothetical cases cited by petitioner (Pet. 7–8).

3. On January 31, 1964, petitioner appeared under subpoena before the grand jury. He was advised that he had a constitutional right not to answer any questions. When asked if he understood he had a right to consult with counsel, he replied, "Yes, sir, you told me that before." He was informed that the grand jury was inquiring into violations of 18 U.S.C. 201 and was "inquiring into specifically your bribery or giving of money to various federal employees in connection with tax matters." He was also told that the grand jury or another grand jury "may vote an indictment charging you with such violations." After being so advised, petitioner denied giving any money to Jean Lupesco. At the trial, this testimony was admitted into evidence (R. 173–175).

The contention that this testimony should have been excluded was properly denied by the court of appeals. Although he asserted a general objection, the only specific objection made by petitioner's counsel appeared to be related to the fact that petitioner had reappeared before the grand jury on the following day (R. 173). Moreover, as a certified public ac-

countant, petitioner had represented taxpayers before the Treasury Department. The statement that he understood that he could consult with counsel could properly be credited by the grand jury. Having been fully warned that the grand jury might vote an indictment against him, he was not deceived as to whether he was a "target" of this investigation when he was called. See *United States* v. *Annunziato,* 293 F. 2d 373, (C.A. 2), certiorari denied, 368 U.S. 919; *United States* v. *Winter,* 348 F. 2d 204, 206–208 (C.A. 2), certiorari denied, 382 U.S. 955.

Equally without merit is the claim that the government should have not have been allowed to introduce this testimony without introducing the testimony given by petitioner before the grand jury on the following day. As the court of appeals observed with regard to the following day's testimony (Pet. App. 0), "Essentially all of the testimony which [petitioner] gave to the grand jury consisted of his claims of privilege against self-incrimination. There was virtually no substantive testimony given." In any event, government counsel inquired whether petitioner wanted "the minutes of the next day" to be offered in evidence, and petitioner's counsel responded that he merely wished "to see them" (R. 173). Since the second day's minutes contained nothing more than the claims of privilege, the failure to produce them for inspection was not prejudicial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 1017

LOUIS IRWIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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On the element of intent, the Brief for the United States in Opposition limits itself to "whether a specific intent to influence an official act is an essential element of the statute (18 U.S.C. 201(f)) . . ." (Br. p. 1).

The question is much broader: "Is *criminal* intent an element of the felony defined in 18 U.S.C. §201(f)?" (Petition, p. 3)

We believe that criminal intent *is* a necessary element in the crime, and that the trial judge did not adequately so charge. *United States* v. *Byrd,* 352 F. 2d 570 (2d Cir. 1965)

The absence of criminal intent on petitioner's part is indicated by:

1. His acquittal on the count charging him with intent to influence (304a).

2. The fact that the tax returns being audited were true, accurate and supported by checks, vouchers, etc. (186a; 200a; 206a; 214a) Their accuracy was not even questioned by the prosecution (217a).

The validity of 18 U.S.C. §201(f) is one of the issues in another pending petition for certiorari: No. 1001, Eugene Kenner v. United States. The Court may wish to consider the two petitions as companion cases.

Respectfully submitted,

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